Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment	)	
by Removing Barriers to Infrastructure	)	WT Docket NO. 17-79
Investment	)	
	)	
	)	

INITIAL COMMENTS OF
LIGHTOWER FIBER NETWORKS

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SUMMARY

As described herein, Lightower contends with a patchwork of state and local approval processes for small wireless facilities (*i.e.*, DAS and small cells) in the public right-of-way ("ROW"). The lack of predictability and ongoing struggle to obtain approvals within a reasonable time period has a chilling effect on investment because it is difficult to anticipate installation timeframes. Lightower believes that the only solution to this problem is for the Commission to adopt a "deemed granted" remedy after the expiration of a shot clock. Lightower also requests the Commission clarify that non-tower and replacement structures fall within the "collocation" shot clock and that moratoria do not toll shot clocks.

Additionally, regulatory compliance with the National Historic Preservation Act and the National Environmental Policy Act is overly burdensome and only serves to further delay the deployment of wireless broadband infrastructure. There does not seem to be a strong, if any, public policy benefit to applying these regulations to small wireless facilities in the ROW, and so Lightower requests the Commission reform both acts in order to remove unnecessary delays.

Finally, there is a great need to establish consistency and unity between 47 USC Section 253 and Section 332(c)(7). Wired and wireless broadband infrastructure are both critical to a robust national network, particularly as it evolves into 5G. Streamlining these two similar statutes will eliminate the uncertainty faced by those who construct both wired and wireless infrastructure in the ROW. Lightower requests the Commission exercise its regulatory powers to establish clear rules that require telecommunications infrastructure in the ROW be treated in a nondiscriminatory manner. All of these regulatory reforms will encourage broadband investment.

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I. INTRODUCTION

Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, L.L.C. (collectively, "Lightower") are competitive providers of fiber network services that serve enterprise, government, carrier and data center customers. Lightower has over 17 years of experience investing in fiber and small wireless infrastructure, and its network consists of approximately 30,000 route miles providing access to over 20,000 service locations in the Northeast, Mid-Atlantic and Midwest. Lightower also improves and expands its fiber footprint every month by, on average, approximately 175 route miles.

As a telecommunications public utility with a certificate of public convenience and necessity ("CPCN") or equivalent from each state in which it operates, Lightower has a long history of operating as any other utility utilizing the public right-of-way ("ROW") when expanding or improving its extensive fiber optic network. However, as discussed in detail below, whenever the use of the ROW involves even a small wireless element, the effort to obtain needed permits is often thrown into uncertainty and a long and frustrating ordeal commences, because states and local jurisdictions (1) will not act upon, approve or deny the wireless facilities in a certain or reasonable timeframe, (2) may demand unreasonable compensation for use of the ROW, and/or (3) will subject Lightower's application and construction requirements to lengthy, costly, discriminatory and burdensome processes. These barriers in various forms can be so insurmountable as to cause abandonment of wired and wireless infrastructure investments entirely.

Earlier this year, Lightower submitted comments and reply comments to the Federal Communications Commission ("Commission") in the WT Docket 16-421.[1] Lightower carefully documented the barriers that it has encountered in its efforts to build wired and wireless broadband infrastructure and incorporates those Streamlining Comments and Streamlining Reply Comments into the record by reference since they deal with many of the same issues raised in this WT Docket No. 17-79 ("Wireless NPRM/NOI").[2] Even though several months have passed, the same examples of barriers to wired and wireless infrastructure investment continue and, in many cases, have grown more challenging.

Lightower appreciates the Commission's continued attention to these barriers and welcomes this opportunity to provide additional evidence regarding why further streamlining of statutory interpretations and the development of regulations are critical to encouraging investment in wired and wireless broadband infrastructure.

II. COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

A. Streamlining of State and Local Review is needed to Encourage Broadband Infrastructure Investment across States and Local Boundaries.

Lightower welcomes the Commission's efforts to streamline "the process for reviewing and deciding on wireless facility deployment applications conducted by State and local regulatory agencies."[3] In the past 21 years, federal courts, states and local jurisdictions have all

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[1] *See In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, WT Docket No. 16-421, Initial and Reply Comments of Lightower Fiber Networks, submitted, respectively, March 8, 2017 and April 7, 2017 (hereinafter "Streamlining Comments" and "Streamlining Reply Comments," respectively.)

[2] *See generally* Streamlining Comments, Streamlining Reply Comments.

[3] Wireless NPRM/NOI ¶ 4.

been moving in various directions on the issues raised in this proceeding, creating a patchwork of conflicting interpretations of the Telecommunications Act of 1996 ("1996 Act"). The lack of consistent guidance regarding statutory interpretation is creating uncertainty at the state and local level, with many local jurisdictions seeming to simply make it up as they go. Differences in the federal courts are only exacerbating the patchwork of interpretations at the state and local level. At this juncture, there are so many referees who all interpret the "rule book" differently at different times that there are effectively no clear rules. This is why it is critical that the Commission provide clarity regarding key federal statutes.

One suburb of Detroit exemplifies the absence of accepted rules and the resulting roadblocks to both fiber and small wireless broadband investment. For well over a decade, this township was one of the best jurisdictions for investing in distributed antenna systems ("DAS").[4] DAS technology was a perfect fit for this largely residential area because the fiber and equipment could all be efficiently located on existing utility poles.

Lightower knew this history, so while it had not previously constructed DAS nodes in the township, in December 2015 it requested approval for its DAS nodes in the same manner in which the township had previously approved the DAS nodes of several of Lightower's competitors.[5] For reasons unknown to Lightower, the township suddenly changed this historic regulatory approval process and instructed Lightower to proceed under the township's zoning ordinance for the DAS nodes.

[4] In Michigan, small wireless facilities are referred to as DAS, which have been deployed in various communities, including this township, since approximately 2004/2005.

[5] Until 2015, the township followed the Michigan Metropolitan Extension Telecommunication Rights-of-Way Oversight ("METRO") Act to approve DAS and fiber infrastructure.

After nearly a year of trying to figure out how to apply a zoning ordinance for macro sites to DAS nodes, Lightower was able to submit applications that the township considered "complete." During this same year, another Lightower competitor went through this zoning process and obtained approval, so Lightower was optimistic that it would be able to do the same. Unfortunately, that optimism was misplaced. During a planning commission meeting in May 2017, Lightower was informed that not only did the METRO Act not apply, but neither did the Michigan law governing wireless zoning. The result was the planning commission's recommendation to deny all of Lightower's proposed DAS nodes.

When Lightower tried to explain that a denial would constitute a complete prohibition under federal law and be out of compliance with state law, it was informed that its interpretation of the law was incorrect and that there was not a "prohibition" because the township was in the process of creating a new, third type of approval process, which Lightower could use to obtain approval—someday. When Lightower asked for at least a final decision on its applications in conformance with state and federal "shot clocks," it was also informed that its interpretation of shot clock law was incorrect and no decision would be issued.[6]

As of the time of this filing, Lightower's network investment in the township and neighboring communities is in jeopardy. Longstanding relationships with township staff and counsel have been usurped by new outside attorneys with novel interpretations of both state and federal laws who appear more focused on Lightower dedicating dark fiber for the township's use

[6] *See generally* MCL 125.3514 (establishing a 60 day shot clock for collocations on utility poles); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd. 13994 (2009) ("*Shot Clock Order*") (establishing a 90 day shot clock for "collocations").

than on an actual path forward to obtain approval within the confines of any law.[7] Lightower has already constructed a substantial portion of the larger network in a neighboring jurisdiction, so if it cannot receive approval in the township, that investment could be stranded without use. The lack of clarity regarding applicable law enables states and local jurisdictions to essentially ignore applicants and treat some applicants differently from others. This chills investment and runs contrary to the 1996 Act and everything the Commission is seeking to do today to encourage greater investment in our nation's infrastructure.

Examples like this and others below illustrate the critical need for the Commission to streamline state and local review processes by establishing clear and consistent parameters to everyone involved in the improvement and expansion of wired and wireless broadband infrastructure, particularly the regulatory gatekeepers who hold the key to whether networks are approved or denied.

1. A "Deemed Granted" Remedy for Missing Shot Clock Deadlines is Critical to Streamlined Broadband Infrastructure Investment.

The time has come for the Commission to "establish a 'deemed granted' remedy for violations of Section 332(c)(7)(B)(ii)."[8] As discussed in Lightower's Streamlining Comments, Lightower has experienced increasing delays in obtaining needed permits to build broadband infrastructure each year since 2014.[9] In 2016, the average timeframe for approval was 300 days. In March 2017, the average was 475 days without a clear process or determination, and it is now

[7] *See generally* Streamlining Comments at 11 (discussing the common practice of local jurisdictions requesting "in kind" donations in order to obtain approvals that would otherwise be granted under federal, state and local law).

[8] Wireless NPRM/NOI ¶ 8.

[9] Streamlining Comments at 3.

approximately 570 days. Many jurisdictions are still at a complete standstill for approximately 190 DAS and small cell locations.[10] Some applications have been ongoing for more than three years. If Lightower were to engage in litigation in an effort to require action by the applicable municipalities, it would still have approximately 46 Shot Clock Order lawsuits, which is neither an efficient use of resources nor a productive path for obtaining timely approval for broadband infrastructure.[11] This is why the Commission should adopt a "deemed granted" remedy for State and local agencies' failure to satisfy their obligations under Section 332(c)(7)(B)(ii) to act on applications outside the context of the Spectrum Act."[12]

a. The Commission Should Establish a "Deemed Granted" Remedy.

Lightower strongly supports the Commission's establishment of a "deemed granted" remedy and agrees that the Commission has legal authority to adopt this approach. Lightower also agrees there is "no reason to continue adhering to the cautious approach articulated in the *2009 Shot Clock Declaratory Ruling*" because this approach has not been effective to fulfill Congress's intent to encourage robust broadband deployment.[13]

First, Lightower agrees that there is no legal limitation on the Commission's authority to interpret statutory definitions.[14] When the Commission adopted the "rebuttable presumption" of maximum reasonable amounts of time in 2009, those who invest in wireless broadband infrastructure hoped that state and local jurisdictions would follow this direction. However, as

[10] *Id*.

[11] *Id*. at 4.

[12] Wireless NPRM/NOI ¶ 9.

[13] *Id*. ¶ 11.

[14] *Id*.

Lightower detailed in WT Docket No. 16-421, local jurisdictions have largely ignored this federal direction on reasonable time periods under Section 332(c)(7)(B)(ii).[15] This unresponsiveness may be due to the fact that it is widely known that a rebuttable presumption is easy to overcome in federal court, essentially making the remedy so toothless that it can easily be ignored. This is why the Commission should clarify that this statutory interpretation of a "reasonable time" is an irrebuttable presumption that results in an application being "deemed granted." Lightower hopes this further clarification of statutory definition would spur states and local jurisdictions to act on applications within a reasonable time period.

Second, Lightower also agrees the Commission needs to reassert that the local control granted to states and local governments under Section 332(c)(7)(A) is *limited by* Section 332(c)(7)(B).[16] Over the past 21 years, Section 332(c)(7)(B) has become the tail that wags the dog with a patchwork of legal decisions that have resulted in (1) disagreements over what these federal statutes mean and (2) essentially *unlimited* authority for states and local jurisdictions to do anything, or nothing, when presented with an application for wireless broadband infrastructure. The most effective way for the Commission to streamline the process for wireless infrastructure investment is to reestablish that the authority given in Section 332(c)(7)(A) is not unlimited. When states and local jurisdictions neither approve nor deny an application within a reasonable timeframe, they fail to act within their limited authority under Section 332(c)(7)(B). Allowing states and local jurisdictions to do nothing for months or even years—as is common—completely undermines the Commission's responsibility to fulfill the Congressional intent of the 1996 Act to encourage wireless infrastructure investment.

[15] Streamlining Comments at 3–5.

[16] Wireless NPRM/NOI ¶ 14.

Third, Lightower fully supports the Commission promulgating "a rule to implement the policies set forth in Section 332(c)(7)" as well as Section 253.[17] The Commission has clear authority under the explicit language of Sections 201(b) and 303(r) in order to make rules and regulations to carry out the provisions of the 1996 Act.[18] If the limitations set out in Section 332(c)(7)(B) were being adhered to in a predictable manner today, then perhaps there would not be a need for new regulations. However, this is not the case. Also, as discussed extensively in Lightower's Streamlining Comments, even the federal Circuit Courts do not agree on the statutory interpretation of the 1996 Act for either Section 332(c)(7) or Section 253.[19] The time has come for the Commission to impose order on a disorderly situation by creating regulations that must be followed uniformly across the nation.

Finally, Lightower does not see a conflict between the Conference Report and the promulgation of rules for Sections 253 and 332(c)(7).[20] To the extent, the Commission feels influenced by the Conference Report, it only discusses "the preemption of local zoning authority."[21] As discussed above regarding a Michigan township, the problems Lightower faces are not "zoning authority" or needing any "preemption" thereof.[22] The problem is that states and

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[17] *Id*. ¶ 15.

[18] *See* 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[19] Streamlining Comments at 12–18.

[20] Wireless NPRM/NOI ¶ 16.

[21] S. Rep. No. 104-230, at 208 (1996) (Conf. Rep.).

[22] *See supra* Section II.A. (Lightower agreed to follow both a standard ROW process and a zoning process, but the jurisdiction has still not decided the manner under which it would

local jurisdictions are not providing any path to approval or denial for small wireless facilities in the ROW. Clearly, Congress did not intend to restrict the authority of the Commission in such a way as to result in a complete breakdown of both 332(c)(7) and 253, which is the case today. Also, no matter what regulations are issued by the Commission providing clarification to these statutes, if history is a guide, there will always be "disputes" under Section 332(c)(7)(B)(i), (ii) and (iii), which may be settled in federal courts pursuant to 332(c)(7)(B)(v). The Commission's authority here is not to settle "disputes" or "preempt" zoning regulations, but rather to provide clear statutory definitions and process parameters, which, again, are needed now more than ever since there is so much ambiguity surrounding the basic meaning of words, such as "reasonable."

b. The Commission Should Clarify the "Shot Clock Order," Particularly as applied to Collocations.

In addition to determining that applications are "deemed granted" if not acted upon within reasonable timeframes, it is also critical the Commission take this opportunity to clarify the definition of "collocation" under the Shot Clock Order to ensure uniform implementation. Until recently, Lightower thought that there was a general consensus on the Shot Clock Order parameters for collocating on existing structures, but that is far from true.

The first loophole jurisdictions use is claiming that the 90-day "collocation" time period only applies to "towers," and as such collocations on any non-tower structure fall into the 150 day time period.[23] This issue recently arose in a town in North Carolina that requires small cells be collocated on existing structures in the ROW. Lightower spent extensive time, resources and

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approve Lightower's applications, but has suggested that the dedication of dark fiber strands may be a way to garner approval).

[23] Shot Clock Order ¶ 46 (jurisdictions argue the use of the word "tower" in this paragraph supports the loophole).

money on negotiating a wireless pole attachment agreement with the primary pole owner in the town. After that agreement was complete, Lightower applied to the town for approval to attach its facilities to an existing wooden utility pole that will not be changed *in any way* by Lightower's attachments. When the "complete" application passed the 90 timeframe, Lightower requested that both parties mutually agree to extend the shot clock by 30 days, but was told that not necessary because this situation is not a "collocation" under the Shot Clock Order because Lightower is collocating on a utility pole, which is not a "tower." It is inconsistent that attachment to a utility pole is a collocation under local code, but not a "collocation" under the 90 day Shot Clock Order. Lightower requests the Commission clarify this term to include attachment to non-tower structures.

The second and more common loophole is that jurisdictions claim any replaced utility pole or streetlight for collocations also removes it from the 90-day collocation shot clock. The reality is that pole owners often want Lightower to upgrade the existing utility pole or streetlight with a new structure before attachment. Lightower does not have any choice in this decision, but must pay to upgrade the structure either as a condition of the pole attachment agreement or to increase the utility pole's capacity in order to meet National Electric Safety Code ("NESC") clearances. Many jurisdictions claim that these types of replacements—even when a pole will be shorter—are not covered by the Shot Clock Order as "collocations" because they are now "new."[24] Lightower requests the Commission clarify that these types of replacement upgrades

[24] This is one among many issues currently being faced by Lightower in a township in Michigan.

are "collocations" so long as they do not result in a "substantial increase" to the existing structure.[25]

These requests are consistent with the Commission's intent to have a faster process when no net *additional* structures are being added to the overall landscape of the ROW because "the addition of an antenna to an existing tower or other structure is unlikely to have a significant visual impact on the community."[26] If a truly new structure (as opposed to replacement of an existing structure) is being requested, the Commission provided a 150-day time period to give local jurisdictions more time to evaluate a change to the overall landscape. Local jurisdictions often force wireless infrastructure providers to negotiate burdensome pole attachment agreements with the utility and then penalize them with extended shot clock delays for attaching to non-tower structures or replacing an existing pole at the pole owner's request before attachment. Lightower is doing everything it can to meet the demands of local jurisdictions while investing in broadband infrastructure, but on many occasions it has acceded to demand after demand, with no guarantee of approval and with a succession of delays. These two loopholes undermine the original intent of the Shot Clock Order to encourage the efficient use existing structures in the ROW and need to be closed.

North Carolina's proposed House Bill 310 would close this loophole by providing specific provisions even when a pole owner requires pole replacements before attachment.[27] From a policy perspective, this solution is consistent with previous determinations that

[25] Shot Clock Order at ¶ 46 (stating, "Collocation applications are easier to process than other types of applications as they do not implicate the effects upon the community that may result from new construction.")

[26] *Id*.

[27] NC HB 310 § 160A-400.55.

collocations should be subject to a shorter process because no additional structures are being added to the ROW, but that is only a regional solution.

The nation needs a consistent shot clock that applies nationwide. For this reason, Lightower requests the Commission further clarify that "collocation" under the federal Shot Clock Order includes attachment to any "existing" structure—even when it is not a "tower" and also applies to replacements of existing structures that are within the confines of the "substantial increase" parameters.

2. The Commission Should Revise the Timeframes for Reasonable Periods of Time to Act on Applications to Better Meet Today's Infrastructure Requirements.

Lightower appreciates the Commission taking an updated look at the reasonable time periods to process applications because wireless infrastructure has changed greatly since the Shot Clock Order in 2009. In 2009, wireless infrastructure was largely located on private property on traditional towers, rooftops, water tanks, and similar structures. Today, small wireless facilities in the ROW are critical to network densification. In order for our nation's wireless infrastructure to improve and be ready for 5G, it is important that changes be made to what is considered a reasonable time period for small wireless facilities in the ROW.

First, Lightower supports the Commission establishing a clear rule that wireless facilities on utility poles or streetlights—even if upgraded with replacement structures—should have the same 60 day timeframe as collocations on "eligible facilities" under the Spectrum Act.[28] Even though Lightower's wireless broadband infrastructure investment is technically outside of the Spectrum Act because there are typically no pre-existing wireless components on utility poles,

[28] 47 U.S.C. § 1455.

streetlights, et cetera, small wireless facilities in the ROW are functionally equivalent to those allowed by right under the Spectrum Act because they efficiently use structures in utility corridors that were constructed to support various types of infrastructure, namely electricity, telecommunications, cable, broadband, public lighting, traffic signals, etc.

Second, Lightower encourages the Commission to extend the application of the 90 day shot clock timeframe to the installation of new utility poles, including streetlight-type structures, in the ROW under 50-feet. Telecommunications and other public utilities, such as Lightower, should have the ability to obtain approval to erect additional utility poles similar to other existing structures in the ROW. The ROW is historically the designated location for all types of utility infrastructure. Small wireless facilities, and the poles that support them, are only the latest form of utility infrastructure. Lightower holds a CPCN from each state where it does business and often places new poles in support of its fiber optic network. These new poles are not controversial and are typically approved within 90 days, which demonstrates that state and local jurisdictions are already equipped to make a yes-or-no decision within 90 days for new utility structures in the ROW. While Lightower has had little difficulty obtaining approval to erect a pole for its fiber network, when the pole is needed for small wireless facilities, Lightower often encounters obstacles to deployment. New structure approval should not discriminate against small wireless facilities, and thus 90 days is a reasonable time period for all new utility structures in the ROW.

Because state and local governments are well equipped to handle requests for approval of all sorts of utility infrastructure in the ROW, Lightower request the Commission establish these two timeframes for small wireless facilities in the ROW: 60 days for the use of utility poles and

streetlight (even if replaced) and 90 days for new structures in the ROW. States and local jurisdictions may always deny an application, but if they do not respond at all, Lightower further requests that these types applications be "deemed granted."

3. Moratoria and De Facto Moratoria Should not Toll the Shot Clock.

Lightower welcomes the Commission's continued focus on the impact of moratoria—formal and *de facto*—on DAS and small cell wireless infrastructure investment. In March 2017, moratoria were impacting 85 Lightower small cells in four states.[29] Even though three months have passed, there has been no progress in any of these jurisdictions even though some of these moratoria date back to 2015.

The chilling effect on investment caused by unending moratoria illustrates why the Commission should adopt a "deemed granted" when local jurisdictions neither approve nor deny applications for wireless infrastructure within shot clock timeframes. An effective remedy is likely the only way to stop endless delay and spur local action.

B. The National Historic Preservation Act and National Environmental Policy Act Need Reexamination.

Lightower appreciates the Commission's efforts since 2014 to bring clarity to the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA") regarding wireless infrastructure, particular small wireless facilities in the ROW.[30] However, so much has been written over the years in various places, it is now nearly impossible for any two people to agree on what anything means, which is why Lightower agrees with the

[29] Streamlining Comments at 10.

[30] Wireless NPRM/NOI at ¶¶ 65–75.

Commission that the time has come to update and clarify the NHPA and NEPA requirements for wireless facilities.

1. The Commission Should Reform the NEPA Categorical Exclusion for Small Wireless Facilities in the ROW in Non-Historic Areas.

Lightower has reviewed the 2014 regulations issued by the Commission and reasons that the Commission may have intended to extend a NEPA categorical exclusion to small cells in the ROW or utility easements based on the language of § 1.1306 Note 4 (assuming the small cell is not in or within 250' of a historic district and complies with radio frequency regulation).[31] This approach would make logical sense because these areas raise no environmental concern as they already accommodate different types of aerial and underground utility infrastructure. However, Lightower is not certain of the Commission's intent.

In order to create more clarity, Lightower requests the Commission state definitively that certain types of wireless infrastructure in the ROW/utility easements have a categorical exclusion and suggests the following criteria to obtain a categorical exclusion:

(a) the site is not in or within 250' of a historic district;

(b) the site is located in an active ROW or utility easement that has either above ground or underground utility infrastructure;

(c) the proposed installation would not increase the height of an existing—including a replacement—utility pole or streetlight by more than 20' or, if a new pole, not be more than 50-feet;

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[31] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies and Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 29 FCC Rcd. 12865 (2014).

(d) the proposed wireless facilities would consist of not more than nine cubic feet for the antenna and not more than 28 cubic feet for the radio and related equipment (excluding meters and power disconnect devices).

Lightower offers these suggested parameters because they are consistent with the form factors of existing utility infrastructure such as power transformers, uninterruptible power supplies, automatic meter reading wireless equipment, streetlights, utility poles, splice boxes, etc. Lightower also encourages the Commission to avoid setting limitations on ground disturbance because active ROWs and utility easements have already been disturbed and thus do not raise concerns regarding further ground disturbance.

In support of the Commission creating clear parameters for categorical exclusion, Lightower can report that its installations of new poles or attachment to existing poles in the ROW have never raised the concern of either a State Historic Preservation Officer ("SHPO") or a Tribal Nation.[32] For this reason, the Commission should adopt a common sense approach to wireless infrastructure that fits these criteria.

2. The Commission Should Reform the NHPA Exclusions for Small Facilities.

Similarly, Lightower encourages the Commission to adopt a more common sense approach to wireless infrastructure in or within 250' of a historic district. Lightower regularly conducts regulatory compliance for small cell facilities in the ROW/utility easements that are in or within 250' of a historic district. These facilities are attached to existing or replaced utility

[32] Lightower's installations have always been at or less than the small wireless facility parameters suggested.

poles and streetlights or on new/additional utility and streetlight-types poles. Again, none of these installations have raised concerns from either the SHPO or a Tribal Nation.

This compliance is costly and adds approximately six months to a deployment schedule. If SHPOs and Tribal Nations showed any concern or interest, then perhaps burdensome regulations would make sense. However, in Lightower's experience, small cell facilities in active ROWs and utility easements are of little to no concern. This makes performing regulatory compliance under NEPA and the NHPA for these types of facilities an inefficient use of time and money that could be better spent building infrastructure and bringing broadband services on air more quickly. For this reason, the Commission should further reform NEPA and NHPA compliance requirements.

III. COMMENTS ON THE NOTICE OF INQUIRY

A. Clarification of the Intersection of Section 253 and 332(c)(7) is Critical Because of Variation Across the Nation.

Lightower appreciates the Commission considering the intersection of Section 253(a) and 33(c)(7) because this clarification is long overdue and particularly critical to companies like Lightower, who construct both wired and wireless infrastructure in the ROW. Lightower believes that the barriers to obtaining approval for wireless facilities are often discriminatory, highly burdensome and in many cases insurmountable, which chills investment not only in wireless facilities, but also in associated wireline facilities.

As discussed in its Streamlining Comments, Lightower needs "the Commission to clarify the law so that fiber and small cell deployments have predictability and consistency across the nation, rather than the random patchwork that exists today."[33] As discussed above, the

[33] Streamlining Comments at 12.

Commission has authority to develop regulations under both Sections 201(b) and 303(r), and today it has a critical opportunity to not only break down the barriers to vital wireless facilities, but also to bring unity to wired and wireless broadband infrastructure investment.

B. The Commission Should Streamline the Definition of "Prohibit or Have the Effect of Prohibiting."

The most important aspect to uniting Sections 253(a) and 332(c)(7) is bringing consistency and clarity to the definition of "prohibiting or have the effect of prohibiting." As Lightower discussed at length in its Streamlining Comments, the unpredictable and uncertain approval timeframes are the biggest hurdles to infrastructure investment because you do not know when, if ever, you will receive approval from a jurisdiction. When decision periods become unreasonable, the Commission should set a parameter that this delay is an effective prohibition because investments are not able to be made.

Establishing definitions for "prohibition" and "effective prohibition" will not impact local control because local jurisdictions always retain the power to approve or deny an application with a standard timeframe. The largest barrier is that local jurisdictions block investment by doing nothing at all.

As previously discussed, going to federal court for a Shot Clock Order violation under Section 332(c)(7)(B) is neither practical nor a strong legal position because local jurisdictions must only overcome a "rebuttable presumption" of reasonableness.[34] Even if Lightower tried to argue in court that failure to act was unreasonable and created an "effective prohibition," it is unclear how a federal judge would interpret that term because there is no clear definition of

[34] *Id*. at 4 (if Lightower brought Shot Clock Order lawsuits, it would have 46 and counting).

either “prohibition” or “effective prohibition” between or, sometimes, even within federal Circuit Courts, which is why the Commission must clarify these statutory terms.

As discussed above, Lightower is currently trying to get a final determination—approval or denial—of multiple DAS applications in a certain Michigan township. Not only does the township not agree with Lightower on the meaning of the Shot Clock Order, it would likely also argue that not making a decision, despite receiving several forms of “complete applications” since October 2015, is neither a “prohibition” nor an “effective prohibition” since it plans to make a decision . . . someday. Without a clear and standard definition of these terms, Lightower would have a steep and uncertain burden of proof to overcome in court.

Once all the stakeholders understand the parameters nationwide without the variability of court interpretations, they will be able to interact more effectively together. This is why Lightower strongly supports the Commission creating an irrebuttable presumption that when a local jurisdiction does not act within a reasonable timeframe, it creates a “prohibition” or “effective prohibition,” at which point the infrastructure investors may rely upon certain regulatory remedies at the federal level. For consistency, Lightower also strongly recommends the definition be the same whether a state or local jurisdiction is operating pursuant to Section 253 and/or Section 332(c)(7)(B).

C. The Commission Should Look Broadly at “Regulations” and “Other Legal Requirements” that Create Barriers to Investment.

Lightower agrees the Commission is not limited in evaluating “regulations” and “other legal requirements” placed on wireless infrastructure by states and local jurisdictions in the process of approving or denying applications under their regulatory power. The Commission

asks if these regulatory powers may also involve a "proprietary" capacity.[35] In Lightower's experience, the proprietary and regulatory functions of state and local governments often become so intertwined as to run afoul of the 1996 Act.

The classic example of where these two functions combine to create an unreasonable condition is when states and local jurisdictions prohibit the placement of new poles in underground ROW areas in order to drive attachment to its own proprietary streetlights and traffic signals. Lightower understands states and local jurisdictions prefer use of existing structures in the ROW; however, when they (1) are the gatekeepers of approval and (2) require attachers to pay high rents and provide other in kind compensations in order to obtain approval, they depart from their proper regulatory authority in an effort to raise revenues and extract other benefits contrary to limitations in the 1996 Act.[36]

Lightower encourages the Commission to establish a clear parameter where states and local jurisdictions *may* require attachment to their own poles, but only when they charge a reasonable rate based on actual costs of maintaining the structures. This approach would be consistent with the regulated rate restrictions for investor-owned utilities under Section 224 as well as a long tradition of cost-recovery for use of the ROW under Section 253. If states and local jurisdictions try to exploit their regulatory authority to generate revenue, the Commission should make it clear that these types of regulations are pre-empted by the 1996 Act because they exceed the limited authority of states and local jurisdictions over the ROW under both Sections 253 and 332(c)(7).

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[35] Wireless NPRM/NOI ¶ 96.

[36] *See* Streamlining Comments 11–12 (describing examples of jurisdictions requiring in-kind "donations").

D. The Commission Should Set Streamlined Parameters for "Unreasonable Discrimination."

Lightower appreciates the Commission examining situations of unreasonable discrimination because this is yet another factor significantly impacting timely deployment of small wireless facilities in the ROW. The Commission mentions specifically placing additional poles in the ROW in underground areas.[37] However, that issue is secondary to more common forms of unreasonable discrimination that occur frequently in aerial utility corridors.

Lightower does its best to efficiently use wooden utility poles for both wired and wireless attachments. When deploying wired attachments, states and local governments typically require minimal, if any, approval, including pole replacements to increase capacity. However, when the attachment is a small wireless facility, these same jurisdictions require Lightower to go through an expensive and time consuming process with no guarantee of obtaining an approval or denial.

The township in Michigan discussed above, for example, requires a minimal approval process for the fiber infrastructure and no approval process for related pole replacements because the pole owner has the ability to upgrade capacity on its poles at any time. Yet, when Lightower sought to attach small wireless facilities to wooden utility poles that must also be replaced to expand capacity, the jurisdiction instructed Lightower to go through an expensive and time-consuming zoning process, which has now lasted beyond the time period prescribed by the Shot Clock Order with no resolution in sight.[38]

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[37] Wireless NPRM/NOI ¶ 98.

[38] As discussed above, the jurisdiction does not consider this situation a "collocation," but rather a new "tower," for purposes of the Shot Clock Order because of the need to increase capacity of the wooden utility pole.

Lightower has encountered a nearly identical set of facts in a town in North Carolina. The total cost to obtain everything needed for the zoning application and the filing fee exceeds $10,000, but again, if Lightower needed to attach non-wireless equipment, there would be a minimal encroachment permit process costing approximately $200. This burdensome approval process has also exceeded the Shot Clock Order, and again, the local jurisdiction refuses to follow the 90 day collocation shot clock because—even though the utility pole is not being replaced—the jurisdiction believes the 90 day time period only applies to "tower" collocations. There is no public policy reason to treat wireless attachments differently than non-wireless attachments in the ROW, particularly in aerial utility corridors.

Discriminatory treatment becomes only slightly more complicated when seeking to place a new utility structure in the ROW, yet there is a clear solution—allow similar new structures as those which have been previously allowed. A typical example of this hurdle can be found in a suburb of Indianapolis, Indiana where Lightower has been requesting to place a dozen new poles since June 2014. The local jurisdiction claimed it could not make a determination because it needed to draft a new ordinance. After several incarnations of state legislation and a new local ordinance, the jurisdiction has declared that its entire city is an "underground district" despite the fact that there are numerous utility pole lines in proximity to where Lightower needs to place its new poles.[39] This discriminatory treatment places Lightower's entire wired and wireless broadband network in the jurisdiction in jeopardy.

The facts are only slightly different in a certain North Carolina city. The local jurisdiction requires that Lightower use existing poles, which are owned by an investor owned utility. In one

[39] Existing utility poles are not available for use according to the pole owner.

situation, the existing poles are not available, and the location will likely have to be abandoned under the application of the zoning code to the ROW. In the other locations, only metal streetlights are available, which raise pole owner attachment agreement complications of their own. However, all of these barriers could be removed if local jurisdictions were required to treat new entrants the same as they have treated other private utility companies, who have been able to place numerous structures in support of their infrastructure investment. It is unreasonably discriminatory to allow one utility to place wooden poles or metal streetlights so that utility may profit from providing utility services; yet Lightower is prohibited from doing the same, thus preventing critical business investments in wired and wireless broadband infrastructure.

These examples illustrate the need for a clear rule requiring states and local jurisdictions treat all utility companies in the ROW equally. Lightower is happy to work with states and local jurisdictions to find aesthetically pleasing structures, but it can find no compelling public policy reason why it should be penalized when other utilities are allowed to operate freely. For these reasons, Lightower requests the Commission create a clear parameter that discriminatory treatment in the ROW is *per se* unreasonable and thus neither in compliance with Section 253 nor Section 332(c)(7).

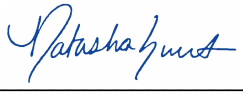
IV. CONCLUSION

Chairman Pai's recent remarks at Mobile World Congress are worth repeating, "[T]he key to realizing our 5G future is to set rules that will maximize investment in broadband."[40] The Commission should seize on this opportunity to unshackle the DAS and small cell providers

[40] Remarks of Federal Communications Commission Chairman Ajit Pai At The Mobile World Congress, Barcelona, Spain (Feb. 28, 2017).

from the discriminatory, anti-competitive practices of many jurisdictions that effectively thwart deployment and stand in the way of realizing our nation's 5G future.

Respectfully submitted,



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